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No. 94-_____

IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

GREGORY DUVALL,

Petitioner,

vs.

CITY OF SANTA MONICA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI

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ROBERT MANN, *Counsel of Record*
DONALD W. COOK
ATTORNEYS FOR PETITIONER
3600 Wilshire Boulevard
Suite 1710
Los Angeles, CA 90010
(213) 252-9444

48 pp

## QUESTIONS PRESENTED

1. In Fourth Amendment excessive force cases, may the court completely disregard all of the plaintiff's evidence, including expert testimony from police practices experts, showing that the police actions served no governmental interest, were contra-indicated, and not in accord with accepted law enforcement standards?

2. Under the Fourth Amendment's reasonableness standard, may the police use deadly force to seize a person because there exists probable cause that he is a danger to himself?

3. Does a person's reported statement that he "feels like going out and killing everybody," establish probable cause that he is likely to kill others, thus justifying the use of deadly force?

4. May the police failure to give legally required notices, announcements, and warnings be excused merely because some people may not cooperate with the police even when they are given?

4. Does the Fourth Amendment's Warrant Requirement apply to seizures of people suspected of being mentally ill, in their homes?

## LIST OF PARTIES

Petitioner Gregory DuVall was plaintiff and appellant in the courts below. Respondent City of Santa Monica was the defendant and appellee in the courts below.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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Petitioner Gregory DuVall respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on December 7, 1994.

## OPINION BELOW

The opinion of the Court of Appeals was not reported. It appears in the Appendix hereto [hereinafter "Apx."], Appendix A. No opinion was rendered by the District Court for the Central District of California. The judgment of the district court appears as Appendix C.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on December 7, 1994. Apx. A-1. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 19, 1995. Apx. B-1. This petition for certiorari was filed within 90 days of January 19, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution*, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*United States Code, Title 42:*

*§ 1983.* Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

*District Court Proceedings.*

Petitioner Gregory DuVall alleged that Santa Monica City police officers violated his Fourth Amendment rights during his arrest on August 13, 1990, and that the City's official policies regarding the training of police and the use of police dogs caused a violation of his constitutional rights, subjecting the City to liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

On the date set for trial (March 2, 1993), following plaintiff's dismissal of all defendants except for the City of Santa Monica, the district court, without prior notice or briefing, granted its own motion for summary judgment against Mr. DuVall on his federal causes of action, and dismissed Mr. DuVall's state claims. AER 33, 90. The district court stated that its decision was based upon the assumption that Mr. DuVall could prove everything he alleged. AER 30:6-7; 32:23-24; 33:6-7; 35:10-11; 38:25 - 39:3; 39:15-19. On June 30, 1993, the district court entered its Order and Findings granting defendant City of Santa Monica summary judgment. AER 90. Because the district court declined to include in its findings the facts Mr. DuVall alleged, but instead based its findings principally on what defendants alleged, on July 15, 1993, Mr. DuVall served his Objections to the court's findings and F.R. Civ. P. Rule 59 motion, AER 92, 212, supported by evidence, including a videotape of an actual police dog attack, photographs of representative police dog injuries, declarations of experts, and depositions. AER 105-272. By order entered September 27, 1993, the district court overruled Mr. DuVall's objections and denied Mr. DuVall's motion. AER 273.

## STATEMENT OF FACTS.[1]

### A. The Police Break-In, Assault, and Arrest.

On the evening of August 13, 1990, Mr. DuVall's sister called the Santa Monica Police Department concerned that, based upon a conversation with her mother, Mr. DuVall might be suicidal. The department telephoned Mr. Duvall's 77 year-old mother who, quite upset, said Mr. DuVall was angry and had argued with her, had over the telephone "threatened" suicide and said "I feel like going out and killing everybody." In response to an inquiry whether Mr. DuVall had any "mental illness," Mr. DuVall's mother informed the police that Mr. DuVall belonged to "Mensa." AER 52-53, ¶ 1.[2]

The police recognized that Mr. DuVall had committed no crime.[3] The department relayed the information to police in the

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[1] The following statement of facts is based on what Mr. DuVall alleged, as contained in Mr. DuVall's proposed findings of fact and evidence.

[2] Mr. DuVall's mother also informed the police that Mr. DuVall had two jobs, including working for a computer business and teaching design engineering at Los Angeles City College.

[3] Cortrite, the Santa Monica police officer in charge at the location of the incident, had it right:

> Q. What kind of criminal investigation did Mr. Duvall refuse to cooperate in?
> A. None that I know of.
> Q. When you were asking Mr. Duvall to come out of his residence, were you of the mind that he had committed some crime?
> A. No.
> Q. So you knew that nothing that had been reported to you indicated that Mr. Duvall had committed any crime whatsoever; correct?
> A. I don't recall anything, no.
> Q. You knew it was not a crime to threaten to commit suicide.

field, who responded to Mr. DuVall's home, arriving at about 11:00 p.m., to check on Mr. DuVall's welfare.[4] At about 11:30 p.m., the officer in charge at the location, Sergeant Michael Cortrite, placed a five minute telephone call to Mr. DuVall. In the conversation, Mr. DuVall informed Cortrite that the only gun he had was a BB gun. Further, in response to Sergeant Cortrite's statement that a relative was concerned, Mr. DuVall informed Cortrite that there was no problem and he was okay. Cortrite asked Mr. DuVall to step outside his home and speak to officers. Mr. DuVall inquired of Cortrite whether he had committed any crime and, upon being told he had not, informed Cortrite that the argument was a family matter, that he did not wish the involvement of the police, and that he did not want to come outside. AER 53, ¶ 2.

During this conversation, Cortrite did not inform Mr. DuVall what his mother had said; nor did Cortrite order Mr. DuVall to leave his home or that he was under any obligation to do so. Cortrite did not indicate in any way that if Mr. DuVall declined to come out of his home that the police would forcibly break into his home or that Mr. DuVall would be arrested. AER 53, ¶ 4.

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A. I don't know of a crime that that is, no.
Q. And what the dispatcher told you and what the mother told you was that Mr. Duvall had told his mother that he was thinking about going out and killing people; correct?
A. Yes.
Q. And thinking about going out and killing people is not a crime, is it?
A. Not that I know of.
Cortrite Deposition page 16, line 1 through page 17, line 21.

[4] According to defendants' brief in the Ninth Circuit, "The Santa Monica police did not go to DuVall's mobile home for the purpose of arresting him. They intended to make contact with him and to see if he needed help and to determine if his threats constituted a danger to himself an/or others." Defendants' Brief at page 13.

Since Mr. DuVall had served in the armed forces,[5] he understood the significance of an order or command, and felt that he was under no legal obligation to exit his home. Had he been informed that the police would break into his home and forcibly extract him if he did not come out of his home voluntarily, he would have come out. Thus, believing he had a legal right to do so, Mr. DuVall remained in his home. AER 53-54, ¶ 5. He concluded his communications with the police by saying, "my home is my castle," "goodnight," then turned out his lights and went to bed. AER 54, ¶ 6.

During the next one and one-half to two hours, the police conferred outside Mr. DuVall's home, eventually deciding they would break into Mr. DuVall's home and forcibly remove him using a dog. The dog handler, Officer Baker, went back to the station to get a battering ram, taking time during the process to let his dog relieve itself. AER 54, ¶ 7.

Although there were numerous resources within Los Angeles County from which the police could have obtained professional assistance in evaluating and dealing with a person who was possibly a danger to himself, and nothing preventing the officers from seeking professional assistance, AER 55, ¶¶ 11, 12, 13; AER 231-33, 243-44, 246, the police made no attempt whatsoever to seek any sort of assistance from any mental health professional.[6] Nor did the police make the slightest attempt to obtain a warrant permitting their entry into Mr. DuVall's home,

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[5] As a Specialist Fourth Class, Radio Intelligence Direction Finding Operator, with a top secret cryptographic security clearance, stationed with the Army Security Agency in Europe, for four years.

[6] The police also made no attempt to re-contact Mr. DuVall's sister or mother or to contact neighbors for the purpose of obtaining further information about Mr. DuVall. AER 54-55, ¶¶ 8, 9, 10.

even though a judge or magistrate would have been available to consider an application for such a warrant. AER 54 ¶ 8; AER 269.

At about 1:50 a.m., without announcement or warning of any kind, the police, assaulted Mr. DuVall's front door with the battering ram, separating it from the door frame and propelling it into the living room onto a glass coffee table, where it shattered the table and broke a lamp. They then stormed Mr. DuVall's home, with fingers on the triggers of their loaded guns. When Mr. DuVall came into view, they pointed their guns at Mr. DuVall, ready to shoot him. AER 55 ¶ 14. Startled from his sleep by the crash of his front door being smashed in and the table shattering, Mr. DuVall sprang from his bed, wearing only a pair of shorts and T-shirt, and took a few steps into the kitchen area, where he saw two flashlights shining at him. Within two or three seconds, and without any announcements, warnings, orders or words of any kind from the police, the dog attacked and bit Mr. DuVall's right lower leg and ankle. Police then forcibly grabbed Mr. DuVall and dragged him through his home, with the dog still biting his leg, and threw him to the ground outside his front door. The officers then handcuffed Mr. Duvall behind his back, AER 55 ¶ 15, and said, "so your home is your castle, asshole."[7]

Police searched Mr. DuVall's home, finding nothing but the BB gun, which they seized. AER 55-56, ¶¶ 16, 17. Police then took Mr. DuVall, handcuffed behind his back and wearing only shorts and a T-shirt and no footwear of any kind.

After remaining at the hospital for approximately 1 hour and 45 minutes, the police transported Mr. DuVall to the jail,

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[7] Nor did the police make any inquiries regarding Mr. DuVall's welfare or ask Mr. DuVall about the information they received from Mr. DuVall's sister and mother.

where police booked Mr. DuVall on charges that he violated California Penal Code Section 148 (allegedly, "resisting arrest") and Section 148.9 (allegedly, "refus[ing] to cooperate during a criminal investigation"). The police placed him, still wearing only shorts and a T-shirt and without footwear of any kind, into a cell. While in the cell, Mr. DuVall repeatedly requested that he be given something to cover his body, because he was very cold. The jailers told Mr. DuVall "this is not a hotel." AER 56, ¶ 19. At approximately 6:00 a.m., police transported Mr. DuVall, still handcuffed behind his back and still dressed only in shorts and a T-shirt and without footwear, to Harbor General Hospital, where hospital staff interviewed Mr. DuVall and immediately released him. AER 56, ¶ 20.

### B. *The Selection and Training of Police Dogs and the Injuries They Inflict.*

Police dogs, normally weighing between 80 and 100 pounds, are selected for their size and aggressiveness, in particular the ability to bite hard and hold a "full mouth bite." In a full mouth bite the dog places its entire mouth around whatever portion of a person's body it can and sinks its canines deep into the flesh, to the bone if possible. The crushing power of the dog's bite is very great, and will break bones. It is impossible to "aim" a dog or to predict when or on whom the dog will inflict an especially severe injury. They are *not* trained to bite "only" on the arm or leg. They are trained to bite any body part the dog can get to, and to re-bite if the victim manages to escape the initial attack. They will and frequently do bite victims in the neck, head, face, genitals and other especially vital areas. In the majority of cases, the dogs inflict multiple bites, including multiple deep puncture wounds and multiple deep lacerations. They frequently rip away body parts, resulting in loss of function. Police dog can kill by biting the neck (*i.e.*, carotid artery), the upper arm (*i.e.*, the brachial artery) and the inner thigh (*i.e.*, the femoral artery). AER 60 ¶30; AER 116 ¶11,

118 ¶17 [Declaration of VanNess Bogardus]; AER 108-11 [Declaration of Peter C. Meade, M.D.].

All persons bitten by police dogs require medical treatment. The required initial medical treatment almost always includes antibiotics, frequently intravenous, to combat life-threatening infections. Radiologic studies are often performed to determine whether bones have been broken. Numerous sutures are very often required, although many wounds can not be closed because of the danger of infection, thus making the scarring even worse. Approximately 25 percent of all persons bitten by police dogs require in-patient treatment in a hospital. A substantial percentage requite surgical intervention, including angiography, vascular reconstruction, plastic surgery and tissue transplants. The great majority of dog bite victims, including those who initially are seen as out-patients or in emergency rooms, require follow-up medical care to monitor for and treat infection. AER 60-61 ¶31; AER 116, ¶12 [Declaration of VanNess Bogardus]; AER 110, ¶H [Declaration of Peter C. Meade, M.D.].

The overwhelming majority of police dog bite victims suffer permanent scarring. Most police dog bite victims suffer some degree of permanent disability from the dog bite injuries. The permanent physical consequences of dog bites range from numbness and itching to major motor deficits such as the inability to grasp effectively with the hand or to endure prolonged standing. AER 61 ¶32; AER 111-12, ¶M [Declaration of Peter C. Meade, M.D.].

The use of a police dog to bite a person is far more likely to inflict injury, and far more likely to inflict serious injury, than is the use of a police baton to strike a person, the use of mace, a taser, or the use of a carotid hold. A firearm is the only weapon commonly used by police which is likely to inflict more serious

injuries (when it hits) than a police dog. AER 61 ¶34; AER 112-13, ¶P [Declaration of Peter C. Meade, M.D.].

### C. *How People React When Attacked By Police Dogs.*

It is very painful and terrifying to be attacked by a dog. Many experience it as being "eaten alive" and fear death. Victims' reactions and terror are often uncontrollable, an instinctual attempt to preserve life and limb. Since the dogs are trained to sink their fangs in deep and re-bite, normal human reactions increase the number and severity of injuries. Pulling away tears body tissues. Temporarily avoiding one bite leads to the dog biting again. Most naturally attempt to stop it, by whatever means. AER 61, ¶33; AER 109, ¶¶F, G [Declaration of Peter C. Meade, M.D.]; AER 117, ¶¶13, 14 [Declaration of VanNess Bogardus].

### D. *The Ineffectiveness of Dogs as a Police Weapon.*

Using dogs to attack people has virtually no legitimate purpose. Dogs do not possess human intelligence or judgment. A dog cannot tell avoiding pain from trying to "escape." It cannot determine what level of force is appropriate, and bite hard or soft, depending on what is called for. It is impossible to exercise complete control over a dog because it has a mind of its own. When attacking, it responds to instincts and is often oblivious to commands. Unlike a gun or baton, it is an unguided missile. Since both victims and dogs are out of control, attacks result in police completely losing control. Since victims are naturally desperate to protect themselves by any means, police are drawn out of cover and into dangerous proximity of both victim and dog,[8] to

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[8] It is dangerous for an officer to approach a suspect, especially a person who is engaged in a desperate attempt to free himself or herself from a dog's attack. Moreover, anyone, including an officer, who approaches the dog while it is attacking may be bitten. AER 62, ¶36; AER 117-18, ¶15, 120, ¶25 [Declaration of VanNess Bogardus].

stop the victim from hitting, strangling, stabbing or shooting[9] the animal. AER 61-62, ¶ 35; AER 121, ¶27 [Declaration of VanNess Bogardus].

Attacking dogs do not reduce shootings; they increase them. Attacked by a dog, anyone with a weapon is likely to use it. People have far less hesitation in shooting an animal than another human for, with the possible exception of police dog handlers, people view humans as more valuable than dogs. Resort to force escalates force. Police confronting a victim trying to use a weapon to protect himself or herself from a dog cannot tell whether the dog will stop every bullet, and cannot afford to find out -- they shoot first. There is a second reason. Understandably attached to their animals, police wrongly use excessive force, including deadly force, to protect their anthropomorphized canine "partners." Recognizing these realities, the standard practice is *not* to use dogs on people actually believed to be armed. At the same time, police justify dog attacks by claiming just the opposite -- that dog attacks are useful with armed "suspects." AER 62, ¶38; AER 120, ¶24 [Declaration of VanNess Bogardus]; AER 247-48 [Deposition of Lou Reiter].

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[9] A dog is no match for a person with a weapon, in particular a firearm. A person with a firearm can shoot a dog. Police dogs are not trained to recognize weapons, including firearms, and are not trained to attack an arm or hand because that arm or hand is holding a firearm or other weapon. AER 62, ¶37; AER 121, ¶27 [Declaration of VanNess Bogardus].

**E.** ***Law Enforcement Standards on Contacts with Persons Suspected to be a Danger to Themselves.***

A substantial percentage of all law enforcement contacts concern people suspected of being a danger to themselves. There is a standard of practice in the law enforcement profession concerning the manner in which officers should handle such cases. The standard is that an officer should evaluate the risk, and attempt to obtain the assistance of a mental health professional. An officer should recognize that time is on the officer's side, that it is best to keep calm and avoid any use of force if possible. A rapid escalation in the use of force, for example rushing a person, is to be avoided absent compelling need, because the risks far outweigh any advantages. If any force is used, police should start at the lowest level and gradually escalate only if necessary. All police departments should train officers how to deal with a person who is suspected of being a danger to himself. A department which fails to do so recklessly disregards necessary training for a substantial portion of the citizen contacts its employees will inevitably face. AER 57-58, ¶24; AER 227-28, 230-31, 243-44, 265, 266-68 [Deposition of Lou Reiter].

Breaking into Mr. DuVall's home necessarily included a risk that, as a result, Mr. DuVall might be injured or killed. It is well recognized in the law enforcement profession that forcible entries into a person's home, especially at night and especially when unannounced, carry with them a substantial likelihood that violence, including injury and death, will occur. This risk is enhanced where the person is suicidal. Persons who are suicidal sometimes attempt to provoke the police to kill them. AER 58, ¶25; 241-42, 253 [Deposition of Lou Reiter].

**F.** ***Law Enforcement Standards on Use of Force.***

The law enforcement profession has standards governing the use of injuring force. Injuring force is any force likely to cause

injury. The Commission on Peace Officers Standards and Training of the State of California (POST) publishes standards applicable to California peace officers. POST standards reflect national standards. POST dictates that an officer should only use injuring force to overcome suspects who fail to submit to non-injuring control techniques. POST provides that, when possible, an officer should give verbal warnings before resorting to any use of physical force. Injuring force should not be used where an officer is faced with passive resistance only.

The law enforcement profession has standards governing when force which may cause death or serious bodily injury may be used.[10] The standard is that force which may cause death or serious bodily injury may only be used when there is probable cause that the person against whom such force is used presents an immediate danger of death or great bodily injury to the officer or another. AER 59, ¶¶27, 28; AER 116, ¶¶ 9, 10 [Declaration of VanNess Bogardus].

**G.** ***City of Santa Monica Responsibility.***

**(1) <u>No Training About How to Deal With People Who Are A Danger To Themselves.</u>**

Sergeant Cortrite had been employed by the Santa Monica Police Department for 23 years. He was the officer in charge of and responsible for the operation at Mr. DuVall's home, including the decision to break in to Mr. DuVall's home without a warrant

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[10] The law enforcement profession has a standard for what is considered "deadly force." The standard is that any weapon which is reasonably capable of causing death or serious bodily injury is "deadly force." It is not necessary that the force will likely cause death. (On average, police hit approximately 25 percent of the persons they shoot at.) For example, the use of an impact weapon, such as a baton, to strike the head is considered "deadly force." AER 59, ¶29; AER 116, ¶10 [Declaration of VanNess Bogardus]; AER 211; AER 250 [Deposition of Lou Reiter].

and to use the dog to attack Mr. DuVall. Sergeant Cortrite received no training from the City of Santa Monica concerning how one should handle a person who is a potential threat to himself. Sergeant Cortrite had never been trained regarding the dangers of rushing a person who is believed to be a suicide risk (including the risk that a suicidal person will attempt to provoke the police to kill him or her), or trained that time is on the side of the police, or trained that one of the primary tasks of an officer confronted with a potentially suicidal person is to evaluate the risk of suicide, or trained that an officer should gather information about the person believed to be a suicide risk, or trained that an officer confronted with a person believed to be a suicide risk should obtain professional assistance. Sergeant Cortrite never received any information from the Santa Monica Police Department regarding what resources are available to an officer who is confronted with a potential suicide risk. The department's failure to train Sergeant Cortrite constitutes a serious failure to train officers regarding critical police practices. AER 58, ¶26; AER 265-66, 271 [Deposition of Lou Reiter].

**(2) No Investigation of Dog Bite Injuries.**

There is a standard in the law enforcement profession regarding the evaluation of weapons. The standard is that, before a weapon is adopted for use by a law enforcement agency, an evaluation should be made of the nature and severity of the injuries which the weapon is likely to inflict. AER 63, ¶40.

The City of Santa Monica does not monitor and has never conducted any study of any kind to determine the nature or severity of injuries police dogs are likely to or do inflict. The City has never conducted any study of any kind to compare the nature or severity of injuries police dogs inflict to the nature and severity of injuries inflicted by other weapons commonly used by the police. The City of Santa Monica has never considered the psychological

injuries police dog attacks cause. Cortrite, in accordance with the training provided him by the City of Santa Monica, incorrectly considered the use of a dog to bite a person to be less likely to inflict injury than the use of a police baton to strike a person. AER 62-63, ¶¶39, 41; AER 116-17, ¶12 [Declaration of VanNess Bogardus, ¶12].

**(3) Ratification.**

This incident was reviewed by the Chief of Police, James F. Keane. Chief Keane makes policy for the police department. Chief Keane expressly ratified the officers' actions by finding in writing that the use of the dog was within the policy of the City of Santa Monica. In Cortrite's view, based upon his 23 years of experience with the Department, the handling of the incident was in accordance with the policies and practices of the Santa Monica Police Department. No one ever informed Cortrite that the manner in which the incident was handled was not in accordance with the policies and practices of the Santa Monica Police Department. Baker, based upon his 12 years as an employee of the Department, believed that his actions were in accordance with the policies and practices of the Department. Baker was told by his superiors that his actions were in accordance with the policies and practices of the Department. No one ever told Baker that his actions were in any way contrary to the policies and practices of the Department. AER 63, ¶42; AER 87-88, ¶9.

*Ninth Circuit Opinion.*

The Ninth Circuit held that the police actions were reasonable as a matter of law, without regard to any evidence plaintiff offered to show them unreasonable as a matter of fact.

The court justified siccing the dog on Mr. DuVall for two reasons. First, the court held it was reasonable as a matter of law to kill Mr. DuVall based upon his mother's claimed belief that Mr.

DuVall was a danger to himself. As the court put it, "even assuming the use of dogs trained to bite and seize constitutes use of deadly force, the use of such a dog in this instance . . . was objectively reasonable" because "the police had probable cause to think he was likely to kill himself . . . ." Apx. A-7, A-8. Further, the court held, again as a matter of law, that the police were permitted to kill Mr. DuVall based upon his mother's claim that Mr. DuVall said, "I feel like going out and killing everybody." Despite the obvious fact that Mr. DuVall committed no crime at all and the police acknowledgment that Mr. DuVall would have committed no crime at all even if he had harbored or articulated such "feelings," the court found the "severity of Mr. DuVall's crime," as a matter of law provided, "probable cause to think he was likely to kill . . . others," thus justifying the use of deadly force against Mr. DuVall. Apx. A-8.

Without discussing any of the evidence that breaking into Mr. DuVall's home at night without warning or announcement presented a greater danger of death or serious injury to everyone -- Mr. DuVall, the police, and Mr. DuVall's neighbors -- than Mr. DuVall himself presented to anyone, and was grossly unreasonable under existing police standards for dealing with suicide threats, the court justified the break-in because, again as a matter of law, "the officers reasonably feared for DuVall's safety as well as that of neighbors and themselves." Apx. A-3.

The court similarly dismissed Mr. DuVall's claim that he had the right to remain in his home absent a police *order* that he come out and an announcement that they were going to break in if he didn't. It held that no orders or warnings were necessary because, as a matter of law, "[w]hether or not he would have cooperated had he been ordered out and warned of the dog's presence is subject to mere speculation." Apx. A-8.

With regard to Mr. DuVall's claim that the police should have obtained a warrant, the court simply disregarded the uncontradicted evidence that a magistrate was available to consider an application for a warrant, holding that as a matter of law that "a warrant could not have been obtained in time . . . ." Apx. A-3.

## REASONS FOR GRANTING THE WRIT

### 1. The Court Should Hold That The Reasonableness of Police Seizures Under The Fourth Amendment May Not Be Adjudicated In A Vacuum, But Must Be Considered In Light Of Evidence Of Their Actual Reasonableness, Including Evidence From Police Practices Experts Regarding Law Enforcement Standards.

In this case, a primary question is: what information should the courts consider in deciding the "reasonableness" of police conduct? It is Mr. DuVall's position that actual *evidence*, including the knowledge and experience of qualified law enforcement professionals may be offered and must be considered in deciding how law enforcement professionals should act. Neither juries nor judges necessarily possess, as a matter of law, all of the information relevant to determining disputes involving the reasonableness of police actions. Just like medicine, engineering, auto mechanics, or any other field, law enforcement is a profession involving a substantial degree of specialized education, training and experience which is not common knowledge. The reality of police work is not necessarily reflected in "Dragnet," "Hill Street Blues," or "Cops." People go to police academies to be trained to be police officers. The State of California sets standards --

P.O.S.T.[11] -- for the training of law enforcement officers. Law enforcement professionals frequently give expert opinion testimony about the conduct of other law enforcement professionals. Although, due to the selection process, many judicial officers come from prosecutorial backgrounds, this does not necessarily qualify all judges to determine the reasonableness of police actions, without reference to any evidence, including evidence from law enforcement professionals.

As the Court observed in *Tennessee v. Garner*, 471 U.S. 1 (1985), "Actual departmental policies are important" in determining what " 'unreasonable'" under the Fourth Amendment. 471 U.S. at 19. Reasonableness should be "viewed in light of the policies adopted by the police departments themselves." 471 U.S. at 18. State standards should be considered in determining what is "reasonable." *Reed v. Hoy*, 909 F.2d 324, 330 n.5 (9th Cir. 1989) (Police action that violate state law standards can show unreasonableness of police activities under the Fourth Amendment.)

Here, one question was how the police should deal with people who are suspected of being mentally ill or suicidal. Mr. DuVall went to a great deal of trouble and expense to obtain expert opinions from within the law enforcement profession on this question. Mr. DuVall's experts on this subject were Lou Reiter, a former Deputy Chief of the Los Angeles Police Department, and Van Ness Bogardus, III, a retired Los Angeles County deputy sheriff. Mr. Reiter's opinion was that "there was an absolute failure to provide and follow reasonable standards of care in

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[11] According to Cal. Penal Code § 13510, California POST "shall adopt, and may from time to time amend, rules establishing minimum standards for training of city police officers." Under California law, any law enforcement agency that receives funding from POST must certify that the agency "will adhere to the standards for recruitment and training established by the commission." Cal. Penal Code § 13522.

dealing with this type of situation." AER 271 (Deposition of Lou Reiter). At the "summary judgment" "hearing," Mr. DuVall's counsel represented to the court that evidence would show that "it is inconsistent with accepted police practices under a circumstance like this to just break the door down without attempting at least to obtain professional assistance to evaluate the suicidal risk." AER 30 (transcript of hearing).

A second issue was whether it made any sense to sic a dog on Mr. DuVall. Mr. DuVall's position is that most people, including judicial officers, lack experience or other familiarity with the training of police dogs, the reactions of people attacked by police dogs, or the tactical considerations involved in siccing a police dog on anyone, much less a person who might be mentally ill or suicidal. Therefore, Mr. DuVall sought the expert advice of a former law enforcement dog handler and trainer, Van Ness Bogardus, III. For many reasons, Mr. Bogardus found defendant's action unacceptable. Mr. Bogardus' opinion, in part, is that "[a] police dog attack *increases* the likelihood that an officer will resort to deadly force. If the suspect is armed, the dog attack gives the person attacked a reason to use his weapon because of the natural tendency of person to defend themselves from dog attacks. When the dog attacks someone, the police dog handler is usually very close and behind the dog (within a few feet), without cover." AER 120 (Declaration of Van Ness Bogardus, III). At the "summary judgment" "hearing," Mr. DuVall's counsel represented that the evidence would show that "the use of a dog to attack a person provokes the use of force by the person. In other words, if a person is attacked by a police dog and if that person does have a weapon, the use of the dog is as likely to provoke the use of a weapon as it is to prevent it." AER 378 (transcript of hearing).

The district court "accept[ed] plaintiff's version of the

facts," AER 33 (transcript of hearing), but found that "this is not a factual issue; it's a legal issue," AER 35 (transcript of hearing), and decided that "the ordinary use of trained police dogs . . . meets constitutional limits." AER 35 (transcript of hearing). The Ninth Circuit similarly considered the use of a police dog to attack Mr. DuVall to be solely a question of law, to be decided without regard to any evidence and, like the district court, failed to mention or acknowledge any of Mr. DuVall's evidence.

This refusal to consider evidence, including in particular expert testimony, is at odds with established law of other circuits. The Fourth, Seventh, Tenth and Eleventh Circuits have correctly hold that expert testimony is appropriate in police excessive force cases. The Tenth Circuit held that a police practices expert may testify to law enforcement standards and their application to the facts of plaintiff's incident. *Zuchel v. City and County of Denver*, (10th Cir. 1993) (police practices expert testified that officer's conduct was inappropriate under generally accepted police custom and practice). *See also Russo v. City of Cincinnati*, 953 F.2d 1036, 1046-47 (6th Cir. 1992); *Kerr v. City of West Palm Beach*, 875 F.2d 1546 (11th Cir. 1989) (police dog case); *Kladis v. Brezek*, 823 F.2d 1014 (7th Cir. 1987); *McElyea v. Navistar Intern'l Trans. Corp.*, 788 F.Supp. 1366, 1374, 1375 (E.D. Pa.), *aff'd*, 950 F.2d 723 (3rd Cir. 1991).

A Fourth Circuit decision is directly in point. In *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), the district court excluded plaintiff's expert testimony about the use of police dogs and about the prevailing standard of conduct for the use of slapjacks. The Fourth Circuit found both to be an abuse of discretion. Just like here, plaintiff's experts were prepared to testify that it was wrong to use the police dog to attack and bite. The Fourth Circuit found the exclusion of this expert testimony to be an abuse of discretion because

> A dog is a more specialized tool than a gun or slapjack. How to train a poodle to sit or roll over is not everyday knowledge and could be explained by an expert in a case where it was relevant. How to train and use a police dog are even more obscure skills. Both Knott and diGrazia [plaintiff's experts] were qualified to testify about this specialized knowledge by their long experience.
> 993 F.2d at 379.

For similar reasons, the Fourth Circuit reversed the trial court's exclusion of the expert on use of slapjacks, finding that the expert "should clearly have been permitted to testify as to the prevailing standard of conduct for the use of slapjacks." *Id.*

The instant case is unlike *Mendoza v. Block*, 27 F.2d 1357 (9th Cir. 1994), where the reasonableness of causing a police dog to attack a person was submitted to the district court's decision as a *finder of fact*. In *Mendoza*, the plaintiff *agreed* that Judge Hatter could decide whether the use of the dog was reasonable based on the *evidence* presented in a *hearing*. Mendoza presented no expert testimony. Had Mendoza presented expert testimony, the district court, as a finder of fact, was free to reject it. Here, the situation was quite different. Mr. DuVall did not agree that the district court act as a finder of fact. The district court never purported to act as a finder of fact. The district court never asked Mr. DuVall if it was okay if the district court act as a finder of fact. The district court declined to consider any *evidence*. Mr. DuVall was not given any opportunity to present *evidence*. In contrast to *Mendoza*, the district court "*accept[ed]* plaintiff's version of the facts." AER 33, line 6-7 (statement of district court).

Police dog bite litigation in the Central District of

California epitomizes this problem. Thousands of people have been needlessly mutilated,[12] often sadistically,[13] by police dogs. Handlers have been instructed that siccing a "trained" 85-pound German Shepherd on a human being is okay because it will probably reduce the level of violence and is not likely to inflict serious injuries.[14] The evidence is overwhelmingly the opposite.

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[12] *See generally*, G. M. Bush, *Litigation Over Police-Dog Attacks Gains Some Bite*, Los Angeles Daily Journal, Nov. 26, 1990, at 1.

[13] The sadistic use of dogs to brutalize people has a long, bloody history. The European conquerors used dogs extensively to exterminate the peoples of the New World. J.G. and J.J. Varner, *Dogs of the Conquest* (U. Oklahoma Press 1983). As reported in *Moran v. Davis*, 18 Ga. 722 (1855), in 1852 the State of Georgia found it necessary to specifically prohibit owners, hirers and overseers of slaves from "unnecessarily biting or tearing [slaves] with dogs." *Id.* at 724. A war crimes tribunal tried and hanged Confederate Captain Henry Wirz for his use of dogs to mutilate escaped prisoners. N.P. Chipman, *The Tragedy of Andersonville, Trial of Captain Henry Wirz -- The Prison Keeper* (1911) at 410-412, *reprinted as The Andersonville Prison Trial* (1990) ("The tracking hounds would have been sufficient to discover the prisoners, and as they are usually harmless, would have served the purpose of the pursuer and at the same time inflicted no injury upon the pursued.") The Nazi extermination camp Treblinka is remembered in the nightmares of its few survivors not just for its gas chambers. Addicted to the infliction of human suffering, guards deployed Kommandant Franz Stangl's dog "Bari" "to attack people, and specifically their genital regions, on command" as they were herded naked down the chute to their doom at the hands of "Ivan the Terrible." Sereny, *Into That Darkness* -- An Examination of Conscience 202 (1974). *See also Miller v. United States*, 404 F.2d 611, 612 (5th Cir. 1968), wherein the Fifth Circuit affirmed the criminal conviction of two deputies for causing a police dog to attack a prisoner to extract a confession. The court described the deputies' conduct as "subhuman and vicarious animalism."

[14] The consequences of permitting officers to use force is that it will be used. The uninitiated have no conception of the forces which motivate police to hurt people. *See* Jerome H. Skolnick, James J. Fyfe, *Above the Law, Police and the Excessive Use of Force*, 10-11 (1993); Paul Chevigny, *Police Power: Police Abuses in New York City*, 136 (1969).

Dogs regularly inflict serious injuries[15] and *provoke* needless violence. Yet the courts, ignorant of reality and apparently relying on "Lassie" reruns and wishful thinking, are unwilling to consider any evidence in conflict with their erroneous preconceptions.

Here, the problem is multiplied by an equally inappropriate refusal to consider any evidence about a huge and growing police and public health concern -- how to deal with the mentally ill, in particular persons who threaten suicide, without killing them. *See, e.g., Medrano v. City of Los Angeles*, 973 F.2d 1499, 1501 (9th Cir. 1992); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1043 (6th Cir. 1992); *cf. Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). Judges are not omniscient. Like other humans, they must rely on information and expertise of other mortals, not divine inspiration. Here, Mr. DuVall presented clear, uncontradicted evidence that the police handling of this situation served the interests of nobody.

According to this Court, the " 'key principle of the Fourth Amendment' " is the " 'balancing of competing interests.' " "To determine the constitutionality of a seizure," the one must "'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989). This standard requires an evaluation of the governmental interest. Mr. DuVall presented evidence that the police conduct did not further any governmental interest. The governmental interest was to protect Mr. DuVall, Mr. DuVall's neighbors, and the police, from harm. Breaking into Mr.

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[15] *See, e.g.*, K. Snyder's & M. Pentecost, *Clinical and Angiographic Findings in Extremity Arterial Injuries Secondary to Dog Bites*, ANNALS EMERGENCY MED., Sept. 1990 (Doctors at County-USC Medical Center conclude that police dogs frequently inflict serious injuries).

DuVall's home and siccing a dog on him, according to the expert testimony Mr. DuVall was prepared to present, served none of these interests. Everything the police did was contra-indicated, for it *increased the probability of harm to everyone -- as any trained police should know*. Under the Fourth Amendment, how can such evidence simply be ignored?

## 2. The Court Should Hold That Police May Not Use Deadly Force Against A Person Even If They Have Probable Cause That The Person Is A Danger To Himself And That Non-Criminal Statements of "Feelings" Do Not Justify The Use Of Deadly Force.

If anything, the police action here was *unreasonable* as a matter of law. In *Graham v. Connor*, this Court set forth some of the factors governing the force the police may use when taking a person into custody. "[T]he test of reasonableness under the Fourth Amendment . . . requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id., at 396.*

Applied here, *Graham* factors show that the police conduct was unreasonable. First, Mr. DuVall was not suspected of *any* crime. The police action was undertaken pursuant to the non-criminal provisions of California Welfare & Institutions Code § 5150 to prevent Mr. DuVall from harming himself or another. The police should not be permitted to treat a person believed to be a threat to himself like a criminal suspect. Second, there is no justification for using force which threatens greater harm than the supposed suicidal risk poses to himself. Nor do supposed "feelings," articulated or not, justify arrest, much less the use of force which poses a substantial risk of death or serious injury.

Third, Mr. DuVall was neither actively resisting arrest nor attempting to evade arrest by flight. Mr. DuVall was in his bed in his home, asleep. Mr. DuVall never even disobeyed a police command, lawful or otherwise. Mr. DuVall told the police, in response to their request that he come out of his house, that he did not care to do so.

### 3. The Court Should Hold That Legally Required Notices, Announcements and Warnings May Not Be Ignored Merely Because Some People May Not Cooperate Anyhow.

The Ninth Circuit's holding that the police failure to order Mr. DuVall to come out of his home and the failure to warn Mr. DuVall "of the dog's presence" could be ignored because "[w]hether or not he would have cooperated . . . is subject to mere speculation," Apx. A-8, flies in the face of centuries of established jurisprudence. Were this reasoning correct, compliance with the knock and notice requirements of 18 U.S.C. § 3109 and California Penal Code §§ 844 and 1531 would never be necessary, for it could always be said that cooperation is "mere speculation." *Tennessee v. Garner's* requirement that police must give warnings -- *e.g.*, "stop or I'll shoot" -- before using deadly force could safely be ignored, again because compliance is "mere speculation." Police training emphasizing the use of verbalization rather than resort to violence could be cut from the curricula, on the ground that it is "mere speculation" whether people will respond to verbalization. Using a parity of reasoning, police would not be required to give *Miranda* warnings, because it is "mere speculation" whether suspects will heed them.

The court cites to no authority for its remarkable position, which is contrary to elementary principles of law, ignoring a long history of judicial decisions. "The requirement of prior notice of

authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application." *Miller v. United States*, 357 U.S. 301, 313-314 (1958). "Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance." *Ratcliffe v. Burton*, 3 Bost. & Pul. 223, 230, 127 Eng. Rep. 123, 126-127 (1802), quoted in *People v. Rosales*, 68 Cal. 2d 299, 304, 66 Cal. Rptr. 1 (1968).[16]

Moreover, the court disregards Mr. DuVall's claim -- supported by information concerning his military service and former respect for "law and order" -- that *he* would in fact have come out of his home, despite his belief that his personal problems were not the business of the police, had be been told that he was under a legal obligation to do so. AER 53-54 ¶ 5. Thus, not only does the court adopt a grossly incorrect view of how people behave generally, it also declines to judge this case on its individual merits, or accord Mr. DuVall any individual consideration at all.

### 4. The Court Should Hold That The Warrant Requirement Applies To Seizures Of The Mentally Ill.

The court, citing *United States v. Echegoyen*, 799 F.2d 1271, 1279 (9th Cir. 1986), correctly recognized that " '[e]xigent circumstances alone are insufficient as the government must also show that a warrant could not have been obtained in time.' " Apx. A-3. *Echegoyen* itself held, citing *United States v. Good*, 780 F.2d

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[16] A recent case in point was reported in the December 15, 1994 *Los Angeles Times*. "The U.S. government agreed Wednesday to pay $2.75 million to a business executive who was shot and seriously wounded when federal drug agents stormed his suburban house in a botched pre-dawn raid based on a false tip from an informant. . . . When the raiding team battered down his door, Carlson -- thinking he was being attacked by criminals -- armed himself with a pistol and fired, wounding an agent slightly. The ensuing gunfire hit Carlson in the arm, chest and thigh." Page A28.

773, 775 (9th Cir.), *cert. denied*, __U.S. __, 106 S.Ct. 1523 (1986) and *United States v. Manfredi*, 722 F.2d 519, 523 (9th Cir. 1983), that "the government must also be prepared to show that a telephonic warrant was unavailable or impractical." *Echegoyen*, 799 F.2d at 1279.

The court incorrectly declines to apply the warrant requirement, "[b]ecause a warrant could not have been obtained in time to assure the safety of DuVall or others." Apx. A-3. The court's assertion is not supported by the record but is directly contrary to the record.[17]

Neither defendant's proposed Findings of Fact and Conclusions of law, AER 42-50, nor the Court's Findings of Fact and Conclusions of Law, AER 86-89, contended or found that a warrant could not have been obtained in time. Mr. DuVall was the only one to address whether the police had time to get a warrant. At the "summary judgment" "hearing," Mr. DuVall's counsel specifically stated that "[t]hey have plenty of time to get a search warrant. They are there for three hours." AER 17 (transcript of hearing). The defendant did not dispute this claim. The district court "accept[ed] the plaintiff's version of the facts," AER 33, lines 6-7 (transcript of hearing). Furthermore, Mr. DuVall submitted to the district court his proposed findings of facts, in accordance with the district court's determination that it would accept "plaintiff's version of the facts" that a "judge or magistrate would have been available to consider an application for such a warrant." AER 72, ¶ 8.

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[17] Since the panel admitted that Mr. Duvall was not taken into custody "until one to two hours after he stated his refusal [to come out] to the police," Apx. A-8, there was sufficient time to get a warrant.

According to plaintiff's expert Mr. Reiter, the district attorney has an "on call service" which could have been called to try and get a warrant (which in Mr. Reiter's opinion would not have been granted because breaking in was not the appropriate thing to do). AER 269 (deposition of Lou Reiter). Even according to defendant's expert, a telephonic warrant would have been available. (Deposition of J. Callanan page 22).[18] Even based upon the testimony of defendant's expert (Joe Callanan), there was clear evidence that there was ample time to get a search warrant. The conversation with Mr. DuVall, according to defendant's transcript, began between 11:30 p.m. and 11:32 p.m. Appellee's Supplemental Excerpt of Record (ASER) page 67, lines 7, 25. The Santa Monica Police Department Arrest and Booking Record (Exhibit E to the deposition of Lou Reiter), shows that Mr. DuVall was arrested at 1:50 a.m., just as plaintiff represented in plaintiff's findings of fact, AER 72, ¶ 14.

This is not a case like *Echegoyen*, where police were at a remote location in an "isolated mountain community with little fire and police protection," 799 F.2d at 1280, without " 'the necessary forms' to get a telephonic warrant," *id.* at 1279, where it was "fair to assume that a telephonic warrant would have taken quite some time to secure." *Id.*

Even if it were permissible to simply ignore the district court's "acceptance" of the fact that there was plenty of time to get a warrant, and to ignore the evidence that there was plenty of time to get a warrant, there is still no basis for "assuming" that

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[18] The Callanan deposition was attached as an exhibit to the deposition of Mr. Reiter and lodged with district court. AER 213. The portion of Mr. Callanan's deposition to which Mr. DuVall refers is not in the Excerpt of Record because it did not appear necessary given the fact that the district court represented to plaintiff that it was accepting the fact that it was possible to get a warrant and because defendant never claimed that there was not time enough to get a warrant.

telephonic warrants were not reasonably available in the City of Santa Monica in August of 1990. The City of Santa Monica is not an "small community in the forest ares of the San Jacinto mountains," 799 F.2d at 1273 n.1, without even "its own police force," *id.*, "located approximately forty-five miles away" down a winding mountain road from the nearest law enforcement office. *Id.* Rather, it is a city of significant size, with its own substantial police department, and part of a large urban community. Santa Monica is adjacent to the City of Los Angeles, the largest city in California and one of the largest cities in the world. The location of Mr. DuVall's home was minutes from the police station.

It is therefore not at all "fair to assume" that obtaining a warrant was not feasible, as it was in *Echegoyen*. 799 F.2d at 1280.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioner

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 93-56548
D.C. No. CV-91-00945.TJH-G
**MEMORANDUM***

GREGORY DUVALL,

FILED
DEC 7 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Plaintiff-Appellant,

v.

CITY OF SANTA MONICA,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr.,District Judge, Presiding

Argued and Submitted August 3, 1994
Pasadena, California

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

and MERHIGE, District Judge**

I.

Gregory DuVall (DuVall) appeals the district court's summary judgement in favor of the City of Santa Monica (City) in his civil rights suit against the City for breaking into his home without a warrant, taking him into custody, and allegedly using excessive force by having a police dog attack him. We affirm the district court's decision.

II.

DuVall's appeal involves only the City's liability for the actions of its officers, as all individual defendants were dismissed with prejudice on DuVall's motion. To prevail on a 42 U.S.C § 1983 claim against the City, DuVall must show: (1) the officers violated his constitutional rights, and (2) the City's policy caused the violation. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690-92 (1978). Because DuVall has failed to show that his constitutional rights were violated, we do not address the issue of the City's policies.

III.

DuVall contends that his constitutional rights were violated in two respects: (1) when officers, without a warrant and without justification, entered and searched his home in violation of the Fourth Amendment, and (2) when officers took him into custody by means of a dog attack in violation of the Fourth Amendment.

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** Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

A. Entry. Viewing the facts in the light most favorable to DuVall, we hold that the officers' entry, albeit warrantless and unannounced, was justified by the existence of exigent circumstances. "Exigent circumstances are those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers and other persons. . . ." United States v. Echegoyen, 799 F.2d 1271, 1278 (9th Cir. 1986) (internal quotations omitted). "Included within this definition of exigent circumstances is the need to protect or preserve life or avoid serious injury." Id. (internal quotations and modifications omitted).

Here, exigent circumstances occasioned the officers' entry into DuVall's trailer home. The officers responded to an emergency call from the relative of a man who had telephoned his mother to tell her he was armed and suicidal, asked her to listen as he clicked the trigger of a gun aimed at his temple, and told here he "fe[lt] like going out and killing everybody." The reporting relative refused to go herself to DuVall's home because she said she "valued her life too much." After verifying the call with DuVall's mother, the officers went to DuVall's trailer home and called him from a car phone. DuVall maintained he had only a pellet gun, but he refused either to produce the weapon or to leave the trailer. He then turned off his lights and announced he was going to bed. Unable to verify what sort of weapon DuVall possessed, and having learned that DuVall possessed a license for a gun, the officers reasonable feared for DuVall's safety as well as that of neighbors and themselves. Under the circumstances, it was reasonable for the officers to believe that warrantless entry was necessary to preserve lives and avoid serious injury. See Russo v. City of Cincinnati, 953 F.2d 1036, 1043-44 (6th Cir. 1992) (exigent circumstances

justified warrantless entry into home where officers knew individual was (1) mentally disturbed; (2) possessed two knives; (3) radio transmission described him as "suicidal;" and (4) immediately prior to entry, he had turned out lights and fallen silent).

Because a warrant could not have been obtained in time to assure the safety of DuVall or others, the officers' entry into DuVall's home was justified. "Exigent circumstances alone are insufficient as the government must also show that a warrant could not have been obtained in time." Echegoyen, 799 F.2d at 1279 (internal quotations and ellipsis omitted).

Exigent circumstances also justify the police officers' failure to comply with 18 U.S.C. § 3109, which requires police to knock and announce their presence before entry to execute a search warrant. United States v. Tuner, 926 F.2d 883, 886 (9th Cir.) cert. denied, 112 S. Ct. 103 (1991). "A police officer's reasonable belief that announcement might place him or his associates in physical peril constitutes exigent circumstances. . . . Exigent circumstances also include fear for the safety of bystanders." Id. (citations, quotations and ellipsis omitted). In the case before us, the officers reasonably feared harm not only to themselves and bystanders, but to DuVall, who was known to be armed, whether with a pellet or more powerful gun, and who had threatened to kill himself and others.

B. Custody. Seizure of a mentally disturbed person is analogous to a criminal arrest and therefore must be supported by probable cause. See Maag v. Wessler, 960 F.2d 773, 775 (9th Cir. 1991). California Welfare & Institution Code § 5150 provides that police officers may take into

protective custody any person who, as a result of a mental disorder, poses a threat to himself or others. After taking DuVall into custody, the police took him to the hospital for treatment of injuries he received in falling when the dog attacked him, as well as dog bites to his right leg. After holding him overnight, the officers took him back to the hospital for psychiatric evaluation. Given the facts of this case, we find that the officers had probable cause to take DuVall into custody for medical treatment and evaluation pursuant to section 5150.

C. Excessive force.

The district court held that "the use of the police dog was constitutional" as a matter of law. While we hold now that the use of the dog in this instance did not violate DuVall's constitutional rights, we emphasize that we do not hold the use of police dogs or the police department's policy governing the use of police dogs to be incontrovertibly constitutional. See Chew v. Gates, 27 F.3d 1432, 1435 (1994). Rather, the use of police dogs is subject to excessive force analysis. Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994).

Claims against police officers for the use of excessive force are analyzed under the Fourth Amendment "reasonableness" standard, which is an objective one. Graham v. Connor, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). In determining whether the use of force to effect a seizure is reasonable, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" must be balanced against "the countervailing government interest at stake." Id.

(internal quotation omitted); see also Chew, 27 F.3d at 1440.

Three factors are considered in weighing the Governmental interest involved: (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)).

"The three factors . . . are not to be considered in a vacuum but only in relation to the amount of force used to effect a particular seizure." Chew, 27 F.3d at 1441. In Chew, we considered but did not decide whether the use of dogs trained to bite and seize amounts to deadly force. See id. at 1435, 1442. If such use does amount to deadly force, it might be unconstitutional to employ dogs in circumstances like those of Garner, 471 U.S. at 3, where police used deadly force to prevent the escape of a suspect known to be unarmed. See also Chew, 27 F.3d at 1452-53 (Norris, J., concurring in part and dissenting in part). The facts before us, however, are unlike those of Garner or Chew. The officers who took DuVall into custody know that Duvall was armed, and had probable cause to believe that he posed a significant threat of bodily harm to themselves or others, including himself.[3] As Judge Norris observed in Chew,

> It is important to make clear that even

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[3] In addition, the dog in the present case was not let loose to find a hidden person out of sight and command of the officer, as was the case in Chew. Instead, the dog was used in a confined space where he was subject to the control of the officers.

> if the unleashing of [the dog] constituted the application of deadly force against Chew, it would not have been excessive force if [the officer] had probable cause to believe that Chew posed a significant threat of serious bodily harm to themselves or to others . . . In that case, Chew would have no standing to challenge the constitutionality of the LAPD canine policy because he would have suffered no constitutional injury.

27 F.3d at 1455

We hold that even assuming the use of dogs trained to bite and seize constitutes use of deadly force, the use of such a dog in this instance, by officers who wished to prevent harm to themselves and to the victim -- a man locked in a darkened trailer with a gun, who refused to come out or give up his weapon, and whom relatives attested to be suicidal and possible homicidal -- was objectively reasonable. See Mendoza, 27 F.3d at 1362-63 (use of a police dog trained to bite and seize was objectively reasonable where officers had reason to believe plaintiff posed an immediate threat to their safety and safety of others). "The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted." Id. at 1362 (citing White v. Pierce County, 797 F.2d 812, 816 (9th Cir. 1986) (quotations omitted)).

Review of the Graham factors leads to the same conclusion. As we have indicated, "the most important single element . . . whether the suspect poses an immediate safety threat to the safety of officers or others, " Chew, 27 F.3d at

1441, weighs squarely against DuVall. Under the facts as DuVall himself describes them, the officers had objective reason to believe DuVall posed an immediate safety threat. The second factor, severity of the crime, also weights against DuVall: the police had probable cause to think he was likely to kill himself and others. The third factor, actively resisting arrest, is less clearly indicated. While DuVall refused to come out of the trailer when asked to do so by the police, he was not taken into custody until one to two hours after he stated his refusal to the police. Whether or not he would have cooperated had he been ordered out and warned of the dog's presence is subject to mere speculation. Given the weight of the other two factors, and the reasonableness of the officers' decision to employ the dog in order to prevent serious injury or death to DuVall or themselves, we hold that the use of force in this case may be deemed reasonable as a matter of law. While excessive force questions are often reserved for the jury, the court may determine that the force used by police officers was reasonable as a matter of law. Eberle v. City of Anaheim, 901 F.2d 814, 820 (9th Cir. 1990).

Because we hold that DuVall's rights were not constitutionally violated by the officers' entry into his home, or by their use of the police dog to take him into custody, we hold that he has failed to state a claim against the City under Monell. The district court's decision is therefore

**AFFIRMED.**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-56548
D.C. No. CV-91-00945-TJH-G

GREGORY DUVALL,

Plaintiff-Appellant,

v.

FILED
JAN 19 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CITY OF SANTA MONICA,

Defendants-Appellees.

Before: O'SCANNLAIN and T.G. NELSON, Circuit Judges, and MERHIGE, District Judge[1]

The panel has voted to deny appellant's petition for rehearing. Judge O'Scannlain and Judge T.G. Nelson vote to reject the suggestion for rehearing en banc, and Judge Merhige so recommends.

The full court has been advised of the suggestion for en banc hearing and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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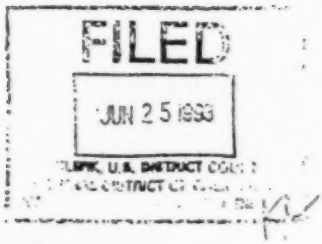
[1] Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.




United States District Court

Central District of California

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|---|---|
| GREGORY DUVALL,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF SANTA MONICA,<br><br>Defendant. | CV91-945 TJH<br><br>**Order and Judgment** |

The Court has considered the City of Santa Monica's motion for summary judgment, with the moving and opposing papers.

It is Ordered that the motion of the City of Santa Monica for summary judgment of the 42 U.S.C. § 1983 claim be, and hereby is, Granted.